

Woodruff & Sons, Inc. and Edward W. Scurek. Case
7-CA-17917

November 10, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On July 31, 1981, Administrative Law Judge Richard H. Beddow, Jr., issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We disagree with the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) of the Act by discharging truckdriver Edward Scurek for engaging in protected concerted activity when complaining about a paycheck shortage and filing an assault charge against a supervisor.

The record overwhelmingly substantiates Respondent's claim that it discharged Scurek solely because of repeated costly damage sustained by the truck he operated. Even assuming that the pay complaint at issue here was a factor in Scurek's termination, we would find that Scurek forfeited the Act's protection by the opprobrious manner in which he pressed the complaint.

Respondent is a general contractor engaged in the installation of sewer and water lines. Scurek was employed as a truckdriver for Respondent from August 1977 until his discharge on May 9, 1980.² As a member of Teamsters Local 298, and under its collective-bargaining contract with Respondent, Scurek filed four grievances asserting various wage claims between October 1977 and April 1980. In addition, during the first 4 months of 1980, he complained about paycheck shortages to his immediate supervisors on between 5 to 10 occasions. At no time during these instances did Respondent take any discriminatory action against

Scurek because of those complaints, and most of his claims were promptly and fully paid. Further, Respondent has received between 40 and 50 employee complaints a year about pay shortages, and mistakes have been corrected by the next payday with a minimum of dispute. No employees have ever been disciplined or retaliated against for questioning the accuracy of their paychecks.

The pay complaint found by the Administrative Law Judge to be protected concerted activity arose on May 1. Upon receiving his paycheck that day, Scurek immediately told his foreman that he had been shorted 11-1/2 hours. Later that day, Scurek complained to Superintendent Mangus that his check was short 11-1/2 hours, declared that he was "goddamn sick and tired of getting f— by the company," and asked what was going to be done about it. After some further discussion, Mangus advised Scurek that a corrected check would be issued the next day and Scurek left the jobsite.

On May 2, Mangus warned Scurek to move his truck off unlevel ground at a jobsite so that it would not tip over and ordered Scurek not to read magazines while in his truck on the job. This was not the first time that Scurek had been admonished by supervisory personnel about operating his truck in an improper manner. Foreman Cook had warned him several times previously not to dump his truck when the truck was not level. Mangus and Respondent's officer, Fred Woodruff, had warned Scurek several times about overloading his truck and driving it too fast on rough terrain. Scurek himself admitted that Respondent's officials "hollered at him" every time he tore the drive line out of his truck.

Later the same day, Mangus gave Scurek a corrected paycheck for an additional 9-1/2 hours, rather than the 11-1/2 claimed. When Scurek asked the reason for the discrepancy, Mangus told him that the payroll office said it was getting tired of Scurek cheating on his timecards and that he was not entitled to the 2 hours. Scurek replied, "We'll see about this." Mangus said, "Well, nobody is going to back you up on your timecard for cheating." Scurek then allegedly shouted at Mangus: "F— Roy Woodruff, F— Fred Woodruff, and F— the Union."³ Mangus replied that Scurek should quit if he did not like it there. Scurek responded by shaking his finger in Mangus' face and declaring: "I wouldn't give you that satisfaction. All you got

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² All subsequent dates refer to 1980, unless otherwise stated.

³ Roy Woodruff is Respondent's president and Fred Woodruff exercises day-to-day control over Respondent's operations. Scurek denied uttering this portion of the profanity alleged to have occurred on May 2. The Administrative Law Judge did not resolve the credibility conflict between Scurek and Mangus, but we note that there is no dispute that Scurek did use the same profanity on the previous day, and no dispute that he made the other remarks and gestures to Mangus on May 2.

around here is a bunch of suckasses." As Scurek walked away, Mangus jumped out of his pickup truck, asked Scurek "Who is a suckass?" and put a headlock on him for 10-15 seconds. When Scurek demanded that he be let loose, Mangus complied. Later that evening, Scurek met with a police officer about the scuffle, and on May 5 he signed an assault complaint and a warrant was issued for Mangus.

At a jobsite on May 8, Scurek backed his truck beyond the level ground where it should have been, and the vehicle stuck in a newly filled area. In trying to free the truck, Scurek broke its short shaft and damaged the ring and pinion gears. It was the second time within a month that the short shaft on the truck had broken while Scurek drove it, and the fourth time in 18 months that the ring and pinion gears were damaged while he operated the truck. Mangus was summoned to the site, where he ascertained what had happened and inspected the damage to the truck. Mangus decided to discharge Scurek at that time. On May 9, Scurek was given his final paycheck and told that his services were no longer needed.

The evidence shows that the Mack dump truck driven exclusively by Scurek between November 20, 1978, and May 8, 1980, required major repairs on its drive line and suspension system on 12 different occasions. Specifically, four times during that period the ring and pinion gears on the truck were damaged and had to be replaced at a cost of between \$1,000 and \$2,000 each time; the U-bolts on the truck were damaged and had to be repaired on four different occasions; the short shaft had to be replaced twice, at a cost of \$700 each time; the center trunnion had to be repaired once at a cost of \$500; and a broken rear spring had to be replaced at a cost of \$550.

By contrast, only 3 of Respondent's other 14 Mack dump trucks needed major repairs of any kind during the same 18-month period, and each of those 3 required only 1 such repair. Moreover, Scurek's truck was the only 1 of Respondent's 15 Mack dump trucks that needed repairs to the ring and pinion gears, short shaft, center trunnion, or U-bolts. Respondent's lead mechanic, Donald Kloss, credibly testified that Scurek's truck required so many more major repairs solely because of driver abuse. As mentioned above, supervisors warned Scurek several times that he was operating his truck improperly, and there is uncontradicted evidence that the infractions for which he was reprimanded

were of the type which would cause the particular damage sustained by his vehicle.⁴

The Administrative Law Judge determined that "it appears that the record of repetitive repairs [to Scurek's truck] could be equally attributable to" an alleged company controlled practice of overloading vehicles, inherent defects in the truck, or inadequate or improper maintenance. He therefore found that Respondent's asserted justification was a pretext and not the real motive for the discharge. The real motive, according to the Administrative Law Judge, was Scurek's protected concerted activity in complaining about the pay shortage and in filing the related assault charge against Mangus. The Administrative Law Judge held that Scurek's behavior while pursuing his wage claim was not so opprobrious that he lost the Act's protection, inasmuch as he did not refuse to obey any direct order and did not physically threaten anyone.

We find the Administrative Law Judge's Decision erroneous both in law and in fact. He applied the wrong standard of proof in assessing Respondent's motivation, and he failed to give proper weight to evidence indicating an absence of unlawful animus, no disparate treatment of Scurek, and the lack of suspicious timing. Further, even if Scurek's wage complaint contributed to his discharge, he forfeited the Act's protection by his May 2 outburst against Mangus.

The Administrative Law Judge improperly required Respondent to show that the extraordinary damage sustained by Scurek's truck was in fact related to the way in which he drove it. Instead, Respondent merely needed to show that it relied on the damage as the real reason for firing Scurek. Such reliance in this case is shown by abundant evidence that Respondent had reasonable grounds for believing Scurek caused the damage. None of Respondent's other trucks met with the same type or frequency of damage as did Scurek's, and the damage occurred only when he drove it. These facts also belie the Administrative Law Judge's speculation that the damage was the result of overloading, inherent defects, or improper maintenance.

Even if Respondent's belief that Scurek was responsible for the damage were mistaken, or unfounded, more is required to find that its motivation for firing him was unlawful. In this regard, the record fails to support a finding that Respondent harbored animus towards Scurek because of his exercise of protected activity. As mentioned earlier, Respondent's employees frequently complained about pay shortages, and Respondent has never re-

⁴ For example, dumping a load when the truck is not level, moving the truck over rough terrain with the box partially raised, and spinning the wheels in an attempt to free the truck from soft dirt near a trench.

taliated against any employee—including Scurek—for doing so. Further, Respondent adjusted Scurek's paycheck upwards by 9-1/2 hours within 1 day after his May 1 claim of a shortage. This was done in spite of Scurek's obscene vituperations in complaining about the shortage and contrary to Respondent's usual policy of waiting until the next week's paycheck to correct errors in wage payments.

The timing of the relevant events in this case also does not support an inference that Scurek was discharged because of his pay complaint or assault charge. Scurek voiced his pay claim on both May 1 and 2, and the Administrative Law Judge found that Mangus knew of the assault charge on May 5. Respondent did not fire Scurek on any of these dates. The decision to discharge him was made on May 8, immediately after he tore up the drive line of his truck for the second time within a month. The event close in time to the discharge was the major damaging of Scurek's truck, not his pay claim or assault charge. Further, in light of the repair history of Scurek's truck and repeated warnings about his reckless driving, the last of which had been given on May 2, there is no basis for drawing the inference that Respondent simply waited for an opportunity to seize upon damage to Scurek's truck in order to mask its true motive in discharging him.

Even assuming that Scurek's wage complaint and the resultant assault charge were factors in Scurek's discharge, we find merit in Respondent's contention that Scurek relinquished any protection he might have had under the Act when on May 2 he shook his finger in Mangus' face and broke into an unprovoked outburst of obscenities. Although the Board long has recognized that an employee's right to engage in protected activity permits some leeway for impulsive behavior, this must be balanced against the employer's right to maintain order and respect. Accordingly, the Board has found that an employee's use of obscenity was protected where it constituted a spontaneous outburst during the heat of a formal grievance proceeding or contract negotiations, or was provoked by an employer's unfair labor practice. The Board, however, consistently has held that even an employee who is engaged in protected activity can, by opprobrious conduct, lose the Act's protection.⁵

Here, Scurek's personal and vulgar attack on Mangus and his fellow employees was not part of the *res gestae* of his arguably protected complaint about his pay. The outburst did not arise in the

context of a formal grievance proceeding or contract negotiations, or in response to an employer's unfair labor practice. In fact, Scurek disregarded the orderly procedures established under the collective-bargaining contract for pursuing wage claims, and instead resorted to insubordination. The evidence clearly shows that the physical encounter between Mangus and Scurek resulted from the latter's comments and gestures about his fellow employees and Mangus, not from Scurek's demand for an additional 2 hours' pay. Since Mangus grabbed him as a reaction to such unprotected behavior, Scurek's subsequent filing of assault charges against Mangus also was unprotected. Under the circumstances, Scurek crossed the line separating acceptable from unacceptable behavior during his confrontation with Mangus on May 2, and therefore that conduct, even if relied on as a reason for Scurek's discharge, cannot form the basis for finding that Respondent violated the Act.

In view of the overwhelming evidence establishing Respondent's reliance on a legitimate reason for Scurek's discharge—i.e., the repeated major damage to his truck—as well as the lack of evidence of animus, suspicious timing, or disparate treatment, and, finally, the unprotected nature of Scurek's conduct, we find that the General Counsel has failed to sustain his allegation of discriminatory motivation. Accordingly, the complaint is dismissed.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting:

Based on my reading of the credited record evidence, I dissent from my colleagues' finding that Scurek's manner of protesting his pay shortage was unprotected, and their reversal of the Administrative Law Judge's finding that Respondent discharged Scurek for engaging in those "protected" activities, in violation of Section 8(a)(1) of the Act.

Scurek's May 1, 1980, paycheck, which was short by 11-1/2 hours or approximately 25 percent, was but the most recent in a long series of payroll errors by Respondent. The Administrative Law Judge found, and the majority does not dispute, that Scurek's complaint to management on that day, which included some profanity, constituted protected concerted activity.⁶ Our disagreement

⁵ See *Clark Equipment Company*, 250 NLRB 1333 (1980); *New Process Gear, Division of Chrysler Corporation*, 249 NLRB 1102 (1980); *Atlantic Steel Company*, 245 NLRB 814 (1979).

⁶ *Merlyn Bunney and Clarence Bunney, Partners, d/b/a Bunney Bros. Construction Company*, 139 NLRB 1516 (1962); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1965).

pertains to the propriety of Scurek's subsequent conduct beginning on May 2, when he asked Superintendent Mangus why the corrected paycheck was for only 9-1/2 hours. According to the credited evidence, Mangus responded that it was because he (Scurek) had cheated on his timecards, and he summarily dismissed Scurek's claim for the additional 2 hours as fraudulent. Scurek reacted to Mangus' false⁷ accusation with obscene language and a finger gesture, which caused Mangus to lose his temper and put a headlock on Scurek for about 15 seconds before turning him loose. Thereafter, Scurek filed an assault complaint against Mangus that resulted in a warrant on May 5, which Respondent received notice of that same day.

The majority has mistakenly found that Scurek's "unprotected outburst of obscenities" and finger-shaking in Mangus' face on May 2 was a personal and vulgar attack on Mangus and his fellow employees, and that it was not a part of the *res gestae* of the pay complaint. Consequently, the majority concluded, Scurek's conduct was beyond the bounds of the Act's protection. I disagree, for it is clear that Scurek's language and finger gesture were merely spontaneous reactions to the provocation of having been called a liar or a cheat,⁸ rather than calculated acts of insubordination. Furthermore, the false accusation by Mangus—which triggered Scurek's conduct—related directly to the merits of Scurek's pay claim and therefore was part of its *res gestae*. On the other hand, Mangus' loss of temper escalated mere words and gestures into a physical assault, and led Scurek to engage in the further protected act of filing an assault complaint. As Scurek's behavior was a natural response to provocation by Respondent's agent, I find no basis for finding that Scurek acted in an improper or unprotected manner in pressing his pay shortage complaint.

I further disagree with the majority's finding that Respondent harbored no animus toward Scurek whom it allegedly terminated for causing repeated and costly damage to the truck he operated. I would, for the following reasons, affirm the Administrative Law Judge's finding that Respondent's asserted basis for discharging him was a pretext, and the true motive was Scurek's protected activities. Ample proof of Mangus' animus is revealed by evidence that Scurek's conduct on May 2 irritated Mangus to the point of losing his temper and resorting to physical force, and that the assault warrant which Scurek instigated was an admitted

source of consternation to Mangus.⁹ Further, credited evidence discloses that Mangus possessed firing authority, made the decision to discharge Scurek at the time of his truck breakdown on May 8, and implemented his discharge decision via a telephone conversation with President Roy Woodruff on May 9. Mangus in that conversation fed Woodruff selected and limited information about Scurek in an effort to have Scurek's discharge order emanate from Woodruff. Thus, Mangus informed Woodruff of Scurek's recent truck breakdown and also disclosed to Woodruff, *for the first time*, that Scurek had caused similar truck damages on several earlier occasions. He further advised Woodruff of his May 2 incident with Scurek, including Scurek's use of profanity and his headlock on Scurek, but he did not mention either the assault warrant or the existence of Scurek's underlying pay dispute. Woodruff predictably responded that Scurek deserved to be discharged in both instances.

It is clear from the foregoing that Mangus' attempts to contrive the discharge of Scurek by Woodruff was designed to conceal his own decision to terminate Scurek for engaging in protected activities. In such circumstances, it is immaterial whether Scurek was in fact responsible for his truck's numerous breakdowns, or whether Woodruff truly believed that he was firing Scurek for that reason. However, it is noteworthy in that connection that prior to his protected pay protests and filing of the assault complaint, Scurek received no written warnings or discipline concerning the repeated truck repairs, and even Respondent's president had been unaware of that matter. Accordingly, I find that Mangus' real and only reason for discharging Scurek was for engaging in the aforesaid protected concerted activities, and that Respondent thereby violated Section 8(a)(1) of the Act.

⁹ At the hearing, Mangus admitted being "upset with himself for having lost his temper and putting his hands on Scurek."

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge: This matter was heard in St. Joseph, Michigan, on April 2 and 3, 1981. The proceeding is based upon a charge filed June 20, 1980, by Edward W. Scurek, an individual. The General Counsel's complaint alleges that the Respondent, Woodruff & Sons, Inc., of Michigan City, Indiana, violated Section 8(a)(1) of the National Labor Relations Act through actions taken which included harassment, assault, and discharge as a result of the Charging Parties' exercise of rights protected by Section 7 of the Act.

⁷ The Administrative Law Judge found that Mangus' accusation was baseless, and that the corrected paycheck should have included an additional hour of "show up" pay.

⁸ Cf. *New Process Gear, Division of Chrysler Corporation*, 249 NLRB 1102 (1980).

Briefs were filed on or before May 28, 1981, by the General Counsel and Respondent. Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following findings.

FINDINGS OF FACT

I. JURISDICTION

By stipulation Respondent admits that at all times material herein it is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 298 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a well-established general contractor, primarily engaged in the installation of sewer and water lines. It conducts operations out of Michigan City, Indiana, and Bradenton, Florida. The latter operation is non-union, however, its other operations are conducted under contracts with various Teamsters local unions, including a contract covering Indiana operations and one operation in Michigan. Respondent's Michigan City operation has 10 or more collective-bargaining agreements with various labor organizations, and, at any given time, it generally employs 150 to 200 workers with work in progress at several locations within a 75-mile radius of Michigan City. Roy Woodruff, president of Respondent, operates the Company from its Florida office. He visits Michigan City several times a year and otherwise controls operations through his brother, Fred, who has day-to-day control, and through weekly telephone contacts with supervisory personnel. He last worked out of Michigan City 8 years ago.

Edward W. Scurek, the Charging Party, was hired by Respondent as a truckdriver in August 1977, and was discharged on May 9, 1980. During his employment Scurek drove a tri-axle truck, No. 508. Scurek was a member of Local 298 of the Union and the contract between Respondent and Local 298 applied to Scurek with respect to wages and other terms and conditions of employment.

In his first 2 years of employment, Scurek filed three grievances asserting various contractual wage claims. On April 15, 1980, he filed a grievance seeking 2 days of pay on the basis that a lower seniority employee had worked when Scurek had not. In the first 4 months of 1980, when working on a jobsite at Stevensville, Michigan, a location within 75 miles of Michigan City, Scurek orally complained about paycheck shortages to Respondent on between 5 and 10 occasions. On these occasions Scurek spoke to either Roland "Butch" Mangus, superintendent of the Stevensville construction project, or Jack Davis, Respondent's public relations man who also had charge of payroll matters. On some of these occasions Mangus

accused Scurek of "padding" his timecards. During the period of his employment, Scurek had never been formally disciplined for any reason, although he and other drivers had been verbally cautioned regarding speeding. On Thursday (the usual payday), May 1, 1980, a foreman gave Scurek his paycheck for the week ending April 26, 1980. Scurek immediately informed the foreman that the paycheck was short 11-1/2 hours. The foreman called Davis; however, Davis did not contact Scurek during the workday. After quitting time on May 1, Scurek drove his personal pickup rapidly into the jobsite office parking area, got out yelling that he had been shortened 11-1/2 hours on his pay and was "goddamn sick and tired of getting f— by the company." He asked what was going to be done about it. Mangus inquired about the shortage and indicated that it could not be checked until the next day. Davis indicated the corrections would be put on the next week's check but Scurek argued that the contract called for payment within 6 days and that he wanted payment that week. Mangus indicated a new check would be issued the next day and Scurek left, accelerating his pickup rapidly.

A. The Events of May 2

On Friday, May 2, 1980, about 10 a.m., Dick Kelly, the job foreman, told Scurek that "Butch [Mangus] says that you are on unlevel ground, move over a few feet." Scurek complied, although he denies that he was on unlevel ground. Mangus then came up to the truck and asked Scurek what he was trying to do. Mangus reached into the cab, "grabbed" a magazine, and told Scurek that he did not want to see him reading "any more magazines in his truck." Scurek was not reading the magazine at the time. Scurek asked "what about the other drivers?" and stated that the magazine was personal property. Mangus responded that he did not care, and walked away. Immediately after this incident, Scurek dumped his load of dirt and drove to a stockpile a mile or more away to obtain another load. Mangus followed Scurek there, watched him load, and followed him back to the jobsite.

At or about 3 p.m., Mangus gave Scurek a corrected paycheck for an additional 9-1/2 hours rather than the 11-1/2 claimed. Scurek asked why and was told it was because he cheated on his timecards. Scurek said, "we'll see about this." Some further discussion occurred and Scurek allegedly then said, "F— Roy Woodruff,¹ F— Fred Woodruff, and F— the Union." Mangus told Scurek to quit if he did not like it there. Scurek gestured with his index finger upraised and replied that he would not give Mangus that satisfaction and that, "All you got around here is a bunch of suck asses." He turned to walk away and Mangus then lost his temper, got out of his pickup, grabbed Scurek, and placed him in a headlock. Mangus held Scurek for between 10 or 15 seconds. Scurek attempted to escape Mangus' grasp, and told Mangus to let him loose and that the State of Michigan would handle this problem. He did not go on the offen-

¹ Scurek denies that he used the specific profanity alleged.

sive. Mangus then released Scurek, returned to his pickup, and left.

Shortly after the assault, Scurek saw a police officer. He briefly spoke to the officer, William Tucker, and arranged a meeting at Scurek's home after working hours. Tucker met with Scurek and Terry Metcalf, a truck-driver who had observed the assault, at Scurek's home the same evening. This discussion took place outside of Scurek's house near Tucker's marked police car. Scurek and Metcalf observed Mangus (as well as Foreman Cook and Mangus' brother, also a foreman) drive by Scurek's home during the discussion.

On May 5, 1980, at or about 2 p.m., Scurek signed a complaint and warrant concerning the assault. Later the same day, officer Tucker allegedly informed Jack Davis that a warrant had been issued for the arrest of Mangus and that Mangus should turn himself in.² Also on May 5, 1980, Mangus directed Davis to write a report of the May 2, 1980, incident with Scurek regarding the warning on tipping his truck over.

B. The Events of May 8

Marty Ambs, a heavy-equipment operator for 22 years who also had some experience as a mechanic's helper, was the operator of a front-end loader on the Stevensville job. He had observed Scurek and found him to be a good driver, with no abusive or erratic habits. Ambs was backfilling part of an excavation at the Stevensville site on May 8, 1980, when Scurek's truck got stuck in a newly filled area. The fill at that spot was a heavy wet clay which had a tendency to "pump" and to be unstable. He observed Scurek twice unsuccessfully attempt to drive out. He did not see Scurek spin his wheels or do anything that might cause damage. The loader was hooked to the front of the truck and an attempt was made to pull it out. The loader was unable to pull the truck free and the drive line apparently broke during that period of time. The truck was still loaded with fill when the attempt was made because the truck was leaning to one side and the box could not be raised sufficiently to unload. The jobsite foreman, Frank Cook, arrived after the damage occurred. He placed a call for assistance and approximately 15 minutes later Mangus arrived. He asked what had happened and was told by Ambs that he tried to pull Scurek out and the truck broke down and he was unable to pull it out with his loader. Mangus then got a camera from his pickup and took a picture of Scurek's truck.

A larger loader arrived a short time later and successfully pulled the truck out. Ambs was not criticized or disciplined for his part in the incident; however, he was laid off in December 1980. Ambs has successfully pulled out other stuck trucks without damage; however, no others were stuck that same day at his location.

Mangus decided to discharge Scurek prior to taking pictures of the incident but did not inform Scurek. (I find that picture taking under such circumstances was not an

uncommon practice and, thus, it is not shown to be an act of intimidation.) On Friday, May 9, 1980, Davis gave Scurek a final paycheck and, without further explanation, told him his services were no longer needed.

On the morning of May 9, 1980, Woodruff called Mangus to check on the Stevensville job. During the conversation Mangus told Woodruff that Scurek's truck had been stuck, and the drive train tore up, and that this was about the third time it had occurred (Scurek's alleged damage to equipment previously had not been brought to Woodruff's attention). Woodruff told Mangus that, if this was the third time, the Company could not afford him and that he should be discharged. Later in the same conversation Woodruff was informed of the May 2, 1980, conflict between Scurek and Mangus, including the alleged cursing and the admission by Mangus that he had put a headlock on Scurek. No mention was made of the assault charge filed against Mangus. Woodruff then told Mangus he should have fired Scurek for insubordination at the time of the cursing incident. Woodruff was unaware of any pay dispute with Scurek; however, Woodruff has a general awareness of other pay incident (where the appropriateness of the paycheck is questioned), which are said to occur 40 to 50 times a year. These occurrences are companywide and mistakes usually are corrected on the next payroll without conflict.

C. Equipment Maintenance

Respondent performs all maintenance on its equipment. Scurek's truck, No. 408, was 1 of 15 Mack dump trucks operated out of Michigan City. The vehicle cost between \$40,000 and \$50,000. No. 508, a 1974 model, and one other vehicle were tri-axle units and the rest were double-axle. Respondent's lead mechanic, Donald Kloss, maintains records of major maintenance for most of its vehicles for a period of 4 years. Truck No. 508 is listed for various repairs on 12 dates between November 20, 1978, and May 13, 1980, when the damage of May 8, 1980, was repaired. Six of the repairs related to U-bolt or U-joint and one to rear springs. Drive train related repairs listed were for ring and pinion gears on three dates (cost \$1,000 to \$2,000 each), the short shaft (\$700 each) once, and both the short shaft and ring and pinion gears for May 13, 1980. Only four other vehicles were listed for similar major repairs.

Based upon his experience, Kloss expressed the opinion that truck No. 508 required more and repeated repair of similar problems due to driver abuse. Equipment operator Ambs testified that damage to trucks involving ring and pinion and spring shackle U-bolt could be caused by overloading and operation on difficult terrain, respectively. Based on his observations, he considered Scurek's truck to be in poor condition, with a tendency to lean to one side whenever the bed was raised for dumping. He also indicated that loading of the truck is controlled by the backhoe operator and that Respondent's trucks were always loaded to capacity or overloaded.

Another Stevensville driver, Terry Metcalf (now laid off), has driven many of the eight or so double-axle Woodruff trucks and has found that at least two of them were found to have repeated mechanical problems. He

² On May 13, 1980, Mangus turned himself into the police (subsequently, a plea of *nolo contendere* was filed on Mangus' behalf). Both Mangus and Davis allege that this was the day officer Tucker notified them of the warrant (rather than May 5) and that, prior to May 13, they had no knowledge that charges had been filed.

also has driven Scurek's truck and considered it to be in bad shape, with excessive vibrations. He considered Scurek to be a good driver. He had had a few arguments with Mangus about union policies and believes that Mangus has a short temper. He considers the area worked in on May 8, 1980, to be fairly level and he otherwise observed the damage incident and he essentially confirms witness Ambs' description of the event.

IV. DISCUSSION

The General Counsel contends that Scurek engaged in two specific acts of protected concerted activity; first, the May 1 complaint about a shortage and, second, the May 5 filing of the assault charge, and that Respondent's discharge of Scurek was a direct result of both activities. Respondent contends that Scurek was not engaged in protected concerted activity, that Scurek was discharged for misconduct, and that his discharge should be considered lawful even if it is found to be motivated in part by protected activity because it is shown that Scurek would have been discharged in the absence of the protected activity.

Upon a review of the briefs and the entire record, I am persuaded that the General Counsel has met his burden of proving an unlawful discharge in violation of Section 8(a)(1) of the Act. Scurek's individual activities to obtain proper pay within the terms of the applicable collective-bargaining agreement is a concerted protected activity within the meaning of the Act. Here, Scurek's past actions in obtaining pay corrections and his statements made during the discussions over his pay indicate his reliance on his union membership and the union collective-bargaining agreement and they reinforce the concept that his individual actions have a direct relationship to the concerted benefit of other union members. Moreover, although it is not necessary that the Charging Party's allegations regarding his pay difference be correct,³ it is concluded that his claim for "show up" pay on April 24, 1980, was not properly handled by Respondent and that he apparently was entitled to another hour's pay in addition to the so-called corrected payment made on May 2, 1980.

The filing of an assault complaint against a supervisor also is a protected activity; however, the record here has conflicting testimony as to whether or not Respondent knew of the assault complaint at the time of Scurek's discharge. Although Mangus and Davis assert that they were not informed of a warrant until May 13, 1980, I find police officer Tucker's testimony regarding his relaying of such information to Davis on May 5, 1980, to be creditable. Moreover, there is other evidence of record showing that Respondent's agents were in a position to have observed Scurek's contact with the police on the day of the assault and I conclude that Mangus

knew of the assault complaint prior to Scurek's discharge.

Although Respondent's Michigan City operations involved cooperative union-labor relations, I find that Respondent's supervisor, Mangus, is shown to have held an animus toward Scurek, which animus is corroborated by his loss of temper and the resulting assault of May 2, 1980, and which animus was generated by Scurek's persistent actions regarding his pay computation.

Scurek's initial protected activity was followed within a short time by a series of petty harassments by Mangus, followed by the assault, and followed by discharge within the following week. Under these circumstances, I find a *prima facie* showing has been made that protected conduct was the motivating factor in Scurek's discharge.

Respondent has attempted to show that the discharge would have occurred regardless of any protected conduct by Scurek because of Scurek's misconduct in damaging company equipment and by Scurek's engaging in insubordinate actions. It also asserts that Scurek should be considered to have relinquished any protection in view of his insubordinate conduct. The right to engage in protected activity permits some leeway for impulsive behavior which must be balanced against the rights of an employer to maintain order and respect, *New Process Gear*, 249 NLRB 1102 (1980). Here, Scurek was given no order to stop cursing nor is he shown to have refused to obey any other order. He did not physically threaten anyone and his cursing is found to have been a spontaneous reaction made in response to the stress of his facing apparent repetitive pay shortages. His words were not carried to a point where they should be considered to be a calculated, flagrant act of insubordination that would tend to disqualify the employee's protection under the Act.

Although Roy Woodruff controls his Company's overall operations and can order the discharge of employees, local job supervisors such as Mangus also have the authority to discharge without seeking his approval. Accordingly, what is most significant is the actual decision by Mangus to discharge Scurek rather than Woodruff's statement that Scurek should be discharged because of his damage to equipment.

Here, the assigned reason for discharge by Woodruff is based upon select and limited information given Woodruff by Mangus. Woodruff was not in day-to-day control of the Michigan City office and was not in a position to be knowledgeable of the actual underlying motive for discharging Scurek. Mangus, as superintendent of the Stevensville jobsite where Scurek was employed, was the person most responsible for Respondent's motivation and it appears that he sought to shield himself from accountability for that motivation by giving his superior, Woodruff, select information that would lead Woodruff to order Scurek's discharge.

The real motivating factors for termination, chargeable to Mangus, were irritation over Scurek's persistent pay shortage claims and his filing of assault charges. As noted, insubordinate conduct was not a controlling consideration, and Respondent's claim that Scurek's dis-

³ Scurek's testimony indicates that he did not fully understand how he was expected to compute his daily time in relation to the nearest quarter hour; however, actual punch-in-and-out times were accurately entered on the same sheet and there was no opportunity for falsification of the total number of hours worked. Moreover, there is no indication that Respondent made any effort to instruct Scurek in the proper way to figure his total hours.

charge was motivated by his misconduct with respect to damage to company equipment is not persuasive.

The only prior record of complaint against Scurek concerned speeding on a residential street. Other drivers were engaged in similar conduct and no individual drivers were singled out for discipline at that time. Furthermore, there is no persuasive showing that Scurek's driving would have a casual relationship to damage of his truck. Credible evidence was presented that Scurek was considered by his fellow workers to be a good driver who did not abuse his vehicle. Abuse, if any, would appear to be most attributable to the practice of overloading vehicles, a practice not in the control of the individual truckdrivers. Although the record of numerous repairs required for Scurek's truck could be indicative of an underlying cause of equipment abuse, it appears that the abuse could just as well be charged to the company controlled practice of overloading vehicles, rather than driver abuse. It also appears that the record of repetitive repairs could be equally attributable to inherent defects in the particular vehicle or to inadequate or improper repair, as contrasted with driver abuse. Creditable support for such a conclusion was presented by witnesses Metcalf and Ambs who indicated that Scurek's truck was not kept in good condition. Moreover, there is no showing that repairs other than those made in connection with the May 5, 1980, incident were chargeable to Scurek because of his inability or misconduct and, in fact, the first time a vehicle breakdown was alleged to be Scurek's responsibility was shortly after he engaged in the above-described protected actions.

As a result of the General Counsel's *prima facie* showing, the burden shifts to Respondent to show that the discharge would have taken place even in the absence of the protected conduct. Accordingly, the speculative nature of Respondent's conclusions as to misconduct with respect to Scurek's operation of his vehicle, in the face of the contrary conclusions expressed by other witnesses, works against Respondent's position and, accordingly, I cannot conclude that Respondent has shown that Scurek would have been discharged merely as a result of the vehicle damage.

I conclude that Respondent's alleged justification was a pretext and not the real motive for Scurek's discharge.

The dominant reason for the discharge was Scurek's protected activity regarding pay claims and assault charges. I further conclude that Respondent has not persuasively shown that Scurek would have been discharged even if his protected conduct had not occurred. Under these circumstances, I conclude that the General Counsel has met his overall burden of proof, consistent with the motivation criteria set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), and *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981), and that by discharging Scurek on May 9, 1980, Respondent violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Edward W. Scurek on May 9, 1980, Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Edward W. Scurek immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed. It is also recommended that Respondent be ordered to make Edward W. Scurek whole for the losses which he suffered as a result of his termination in accordance with the method set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed by the Board in *Florida Steel Corporation*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]